IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,

Respondent/Cross-Appellant,

vs.

ROBIN CARNAHAN,

Respondent,

and

THOMAS SCHWEICH,

Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE,

Respondent/Cross-Appellant.

On Appeal from the Circuit Court of Cole County
Honorable Judge Jon E. Beetem

RESPONSE BRIEF OF RESPONDENT/CROSS-APPELLANT VICTOR ALLRED

June 19, 2012

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STATEMENT OF FACTS

The Auditor's Fiscal Note Duties

The only statute specifying the Auditor's fiscal note duties is Section 116.175, RSMo. It provides in relevant part:

> 1. …upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor **shall assess the fiscal impact of the proposed measure**. The state auditor *may consult* with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal…provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.
>
> 3. **The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities.** The fiscal note summary shall contain no more than fifty words, excluding articles, which **shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure**.
>
> 4. The attorney general shall, within ten days of receipt of the fiscal

> note and the fiscal note summary, approve the legal content and form of the fiscal note summary prepared by the state auditor and shall forward notice of such approval to the state auditor.

§ 116.175, RSMo. (relevant mandatory duties are bolded, and discretionary duties are italicized).

The Auditor's Fiscal Note Procedures

A single employee in the Auditor's office, Jon Halwes, performs the substantive work of preparing fiscal notes and summaries. Tr. 29:14-20. No other person in the Auditor's office, including the Auditor himself, typically reviews Mr. Halwes' work, and the same was true with respect to the petitions submitted by Mr. Grant. Tr. 30:11-17. Mr. Halwes had been working on petition fiscal notes for less than a year when he received the minimum wage petitions; most of Mr. Halwes' training had been "on the job" working by himself. Tr. 30:18-31:5.

Mr. Halwes and the Auditor's office have no manuals, rules, or procedures for preparing fiscal notes except for their unwritten interpretation of the text of Section 116.175, RSMo. Tr. 31:6-15. The Auditor's primary unwritten rule is that, with rare exceptions, it pastes verbatim into the fiscal note the fiscal impact responses it receives from state and local agencies, proponents, and opponents, making as few changes as possible. Tr. 31:16-32:16.

The Auditor undertakes absolutely no "independent analysis or research" other than to paste the responses into the fiscal note for a petition. L.F. II at 221; *See also* Party Stipulations, Appendix to Allred Opening Brief at A50-51 ¶¶ 19-

23. The Auditor's office admitted that it sometimes followed-up with an entity when the entity's response seems "incomplete" or the issues "directly impact them." Tr. 89:23-90:17. It claims to do this on a "case-by-case basis." Tr. 90:18-19. The Auditor's guiding light is the office's own determination as to whether data from the entity will be "relevant" to the "voters." Tr. 34:4-35:1; 66:7-12; 68:1-6; 71:19-72:5; Tr. 73:3-16 (in response to question of whether Auditor's office should have tried to determine if costs were only slightly over $1 million, or were "$10 or $20 million," Mr. Halwes testified, "I would say that we put in the work to comply with the requirements of 116.175, and to the extent that we're providing relevant information to the voters, we did that.").

On direct examination, Mr. Halwes admitted that his office employs no objective or discernible subjective criteria in deciding whether given information will be "relevant to the voters:"

> Q. Well, you would agree with me that over a million, as in 1.4, 1.5 million, is a substantial difference from over a million as in 10 or 20 million, correct?
>
> A. Definitely there is a difference.
>
> Q. Well, it is a substantial difference, right?
>
> A. There is a difference how much it is going to affect the voter. In terms of his or her decision process, I don't know.

Tr. 72:10-18.

Q. Let me ask you this, Mr. Halwes. On the issue of direct costs, which you said was the most important part of the fiscal note summary, was it relevant for voters to know whether the cost was $1.2 or $1.3 million or $10 or $30 million?

A. That's the question?

Q. Yes.

A. The—I'm not sure that any of the numbers are going to resonate with the voters any more than another. And the purpose—I mean, I specifically used the term exceed. I didn't use the term over or about, with the understanding that the voter would see that it is going to be over a million dollars, exceed a million dollars.

Q. What criteria do you use to determine what is going to be relevant to the voters?

A. It is going to vary by fiscal note that we're doing, in terms of the type of information that we get in and what we can pull together from the various sources.

Q. Ultimately isn't it just guesswork?

A. Well, everything that we're doing here is to some extent guesswork.

Tr. 73:25-74:20.

The Auditor Produces Identical Fiscal Notes for Versions 1 and 2

The Auditor's fiscal notes and fiscal note summaries for Versions 1 and 2 were identical. *Compare* L.F. I at 43-56 and L.F. I at 57-70. The Auditor settled upon the following fiscal note summary for both measures:

> Increased state and local government wage and benefit costs resulting from this proposal will exceed $1 million annually. State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, business employment decisions will impact any potential change in revenue. Local government revenue will change by an unknown amount.

L.F. I at 43, 57.

Mr. Halwes arrived at this summary in the following manner. First, he sent requests for fiscal impact estimates to a pre-set list of approximately 25 state agencies and 25 localities or political subdivisions. Tr. 80:5-81:4; L.F. I at 44, 58 (showing that approximately 25 state agencies and 25 cities, counties, school districts, and other subdivisions were contacted). Mr. Halwes believes that the selected local subdivisions represent a "cross section" of the state, but admitted that he doesn't know how they were chosen. Tr. 80:24-81:4. Mr. Halwes admitted he didn't know how many state and local entities employ minimum wage workers, or even what proportion of state and local entities employ minimum wage workers. Tr. 66:13-67:10. Mr. Halwes admitted that the number of state and local

agencies and subdivisions that employ minimum wage workers could be in the hundreds, but he did not know. Tr. 67:6-14.

The Sum Total of the Auditor's Effort to State the Direct Costs Incurred by Public Entities to Pay Wage Increases

The issue of direct cost of wage increases paid by state and local government entities was the Auditor's "key" issue for purposes of the fiscal note and summary. Tr. 65:20-66:2. But Mr. Halwes admitted that he never intended to use his twenty-five-entity "cross-section" in the usual manner—to make a projection, extrapolation, or estimate regarding the size or characteristics of the "whole." Tr. 68:21-69:5. When asked why the Auditor never makes a projection or extrapolation as part of the fiscal note process, Mr. Halwes simply stated, "I can't answer that question." *Id*. Nonetheless, Mr. Halwes recognized from the outset that by failing to make any projection or extrapolation from the "cross section," the fiscal note and summary would necessarily under-report a broad-based cost like the minimum wage: he "knew from the local governments that didn't respond to us that clearly there would be more." Tr. 92:2-5.

The Auditor's one and only request to the twenty-five entities, itself a subset of the potentially hundreds of entities that employed minimum wage workers, netted a total of seven responses. The seven responses (in addition to the Office of Administration, which purported to respond for all state-level agencies) were as follows:

City of Columbia	$140,885.01
City of Jefferson City	$98,947.00
City of St. Joseph	$102,350.00
City of St. Louis	failed to address direct costs
Jasper County	$0 (all workers exceeded the minimum)
Linn State Technical College	$25,000
Metropolitan Community College	$405,000
Office of Administration	$540,000 (or "over" this amount)

L.F. I at 45-48, 59-62.

This smattering of responses alone added up to over $1.3 million. Mr. Halwes performed no independent analysis, projection, or extrapolation, and reached no logical or expert conclusion based upon these responses. Instead, he simply added the seven numbers together and, in the fiscal note summary, stated that costs to state and local entities "will exceed $1 million."

Mr. Halwes made no effort to follow-up with the state's largest cities, Kansas City, Springfield, or St. Louis, which either failed to respond at all or which failed to address the issue in their response. Mr. Halwes made no effort to follow up with large community colleges and universities, such as the University of Missouri, or with any of the seven large counties who failed to respond. L.F. I at 56, 70; Tr. 73:3-13.

Indeed, Mr. Halwes did not even attempt to find out why certain large public entities failed to respond to his first and only request. Tr. 70:10-71:3. With respect

to the City of St. Louis, which the Auditor's office had errantly assumed was the largest city in Missouri (Tr. 69:6-17), Mr. Halwes later claimed he simply "didn't see a need to" make any contact after the City of St. Louis inexplicably left off a "direct cost" number from its narrative fiscal impact statement. Tr. 71:3. This was despite the fact that the office recognized the City of St. Louis was "potentially" the most relevant city in the state (Tr. 71:4-6), because "the bigger the city the more relevant the result it gives you in terms of costs." Tr. 69:14-17.

In contrast to its use of the non-statutory "relevance to voters" criterion in failing to seek data from large public entities to determine direct public costs, the Auditor's office "choose[s] not to enforce" a statutory "10-day limit" for receiving fiscal impact statements of petition proponents. Tr. 82:14-22. Mr. Halwes claims that it disregards the ten-day deadline because "the more information that we can obtain the better fiscal note and fiscal note summary we can have, and if we get it within the time frame to allow us to analyze it, then I'm going to include it." *Id*.

Here, the proponents of the minimum wage petitions submitted a fiscal impact statement several days after the ten-day deadline, which ran on October 15, 2011, via a Thursday, October 20, 2011 email from Lenny Jones, identified as a political operative of the Service Employers International Union ("SEIU"). *See* L.F. II at 209. This left less than three business days before both the fiscal note and fiscal note summary had to be completed and turned in.

The proponents estimated—and the Auditor then agreed and adopted the assumption—that Missouri employers, both public and private, would pay out an

additional $360 million each year as a result of the minimum wage increase. L.F. I at 50, 64. But of that $360 million combined payout by private and public employers, the Auditor's "direct cost" statement assumes that state and local government agencies and political subdivisions' share is merely some amount that "exceeds" $1 million. The Auditor provided no evidence at trial that after accepting this late submission from the proponents, Mr. Halwes made any effort to question whether his "exceeds $1 million" statement, derived by adding together just seven responses, was a reasonable estimate for the public share of the $360 million public-and-private payout.

The evidence at trial showed that direct costs to state and local agencies and political subdivisions are not close to $1 million. Mr. Allred's expert witness, Dr. David Macpherson, testified that the true cost is over $16 million per year. Tr. 149:10-151:4. Dr. Macpherson was able to use publicly-available data from the Current Population Survey ("CPS") to make a reliable calculation, and did not require a complete roster of every Missouri worker. Tr. 150:16-151:13. Dr. Macpherson's entire analysis on all parts of the fiscal note, of which his "direct cost" work was only one part, took just 12 to 15 hours. Tr. 141:14-17.

The Auditor's Treatment of Indirect Effects,

Including Possible Increased Tax Revenue

The Auditor also received information from three sources regarding possible indirect fiscal impacts of the initiatives: increased or decreased tax revenues arising from businesses' payment of—and workers' receipt of—$360

million in increased wages. L.F. I at 46-55, 60-69 (the submissions of the Office of Administration, City of St. Louis, and SEIU/Jobs With Justice).

The only materials the Auditor received—both from the Office of Administration and from the proponents—indicated that among five possible "indirect" effects were *cuts* in two possible areas: (1) employment; *or* (2) business investment. L.F. I at 46, 60; 53, 67. The Office of Administration predicted "lower overall employment (if employers choose to hold costs steady)" and "lower business investment (if employers' payrolls increase)." L.F. I at 46, 60. The proponent, copying a 2006 Office of Administration format and layering in their own projections, also submitted predictions of "the potential for lower employment, especially at firms dependent on low-wage labor," and "the potential for decreased business investment by certain firms dependent on low-wage labor." L.F. I at 53, 67. Finally, the City of St Louis predicted, "while raises to the minimum wage could potentially result in an increase in local earnings and payroll taxes, there is also the potential that the increased payroll costs could be offset by a reduction in workforce at affected establishments thus negating all or a portion of the revenue gains." L.F. I at 48, 62.

On the question of whether the Auditor's reported $14.4 million might be offset by businesses' employment or spending cuts, all of this evidence pointed in the same general direction. First, there was no evidence before the Auditor indicating that *only* job cuts, and not *also* cuts in business investment, would occur. Mr. Halwes specifically acknowledged at trial that both types of cuts could

occur in order to compensate for increased wage costs. Tr. 59:17-62:7. Nor did any materials received by the Auditor indicate that minimum wage hikes would have any affect other than to *decrease* employment, or investment, or both. Both the Office of Administration and the proponents submitted a list of bullet points indicating that any wage increase would cause a *negative* effect on employer costs. L.F. I at 46, 60; 53, 67. Finally, the only facts the Auditor received from any submitter (the City of St. Louis)[1] indicated that job cuts and decreased business investment would have a *negative* effect on tax revenues, not a positive one. L.F. I at 48, 62.

Despite the one-way nature of the three submissions which dealt with revenue, the "indirect" portion of the Auditor's fiscal note summary *failed* to report that the $14.4 million revenue increase could only be eroded, and could not

[1] At best, the proponents' late submission failed to address the issue by making no calculation of any negative economic or fiscal effects from forcing businesses to find $360 million to pay workers. But even then, Mr. Halwes admitted that the proponents' failure made their analysis "somewhat incomplete," and claimed that it had been necessary to address this incompleteness "as part of the fiscal note summary." Tr. 58:5-59:15. And ultimately, Mr. Halwes had to acknowledge that the $360 million in new wage income (upon which he relied to assume a state revenue increase of $14.4 million) could not be created out of thin air, and "would either potentially come out of revenues or profits of businesses." Tr. 59:17-25.

be augmented, by "business decisions." Instead, by failing to describe the business decisions being discussed by his submitters (job cuts or spending cuts), the Auditor left open the possibility that the increase would be "impacted"—that it could go up or down:

> State government income and sales tax revenue could increase by an estimated $14.4 million annually; however, **business employment decisions will impact** any potential change in revenue.

L.F. I at 43, 57 (emphasis added). The Auditor presented no evidence at trial supporting his use of ambiguous phrases to suggest possible outcomes that were not addressed in any of the submissions he received.

The Lawsuit and Procedural History

On November 17, 2011, Cross-Appellant Victor Allred, a citizen, resident, registered voter, and taxpayer of the State of Missouri, timely filed a petition, pursuant to Section 116.190, RSMo., challenging the summary statement, fiscal note, and fiscal note summary for Version 1 and Version 2 of the minimum wage petition. L.F. II at 208, 209.[2] The Secretary of State and State Auditor were named as defendants. Subsequently, JWJ, the proponent of the initiatives, intervened as a defendant. *See* L.F. I at 7.

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[2] On April 10, 2012, Mr. Allred moved to amend his Petition to add a Count IV, a challenge to the Auditor's constitutional authority to prepare a fiscal note or summary. L.F. I at 3-4, 113-116.

On April 9, 2012, Mr. Allred moved for partial judgment on the pleadings on Count I of his lawsuit, which was his challenge to the sufficiency and fairness of the summary statement. L.F. I at 4, 106-112. JWJ and the Secretary of State filed cross-motions for judgment on the pleadings on Count I, and the trial court heard arguments on the cross-motions. L.F. I at 3. On April 25, 2012, the trial court entered its order denying Mr. Allred's motion and granting the defendants' cross-motions. L.F. I at 2, 173-180. The trial court held that the summary statement for Version 1 "constitutes a fair and sufficient summary and provides notice of the purposes of the proposal for those interested or affected by the proposal." L.F. 176 ¶ 11.[3]

Trial on the sufficiency and fairness of the fiscal note and fiscal note summary (Counts II and III) and the constitutional authority of the Auditor (Count IV) was held before Judge Jon Beetem of the Cole County Circuit Court on May 1, 2012. The parties did not dispute the contents or dates of the fiscal note, fiscal note summary, or the submissions made by third parties to the Auditor. *See* L.F. II at 208-209.

[3]JWJ represented to the trial court that it had "withdrawn" Version 2 of the petition. L.F. I at 139-150. Accordingly, the trial court declined to issue any judgment on the summary statement, fiscal note, and fiscal note summary for Version 2.

On May 18, 2012, the trial court entered its judgment in favor of Cross-Appellant Allred on his constitutional challenge to the Auditor's authority (Count IV), but against Mr. Allred on his challenges to the sufficiency and fairness of the fiscal note and fiscal note summary (Counts II and III). L.F. II at 206-234. In sustaining Mr. Allred's constitutional claim, Judge Beetem observed:

> The facts showed that the Auditor's work was not an "investigation." …At trial…the Auditor's representative admitted that he simply pasted voluntary responses into the fiscal note, and then summarized these receipts in fifty words without making any follow-up inquiry to any of the voluntary responders. He contended that this is all Section 116.175 requires. If the Auditor's mere compilation of responses and "sufficient and fair" summary of those responses is all that Section 116.175 requires, then that statute does not require an "investigation" as the Constitution understands it. Instead, it requires something closer to clerical work.

L.F. II at 231-232 (Judgment at 26-27).

Mr. Allred appeals from the trial court's judgment on the sufficiency and fairness of the summary statement, fiscal note, and fiscal note summary for Version 1 of the initiative.

SUMMARY OF ARGUMENT

The Auditor's position in this litigation is at war with itself. At issue here is the second of two contradictory positions the Auditor continues to maintain: (1) that Section 116.175 does not require him to "independently assess" fiscal impact, so that his fiscal note and summary in this case do not run afoul of Sections 116.175 or 116.190; but (2) that his assembly of fiscal notes and summaries under Section 116.175 without "independently assessing" fiscal impact is still an "investigation" and is therefore constitutional.

The trial court also recognized the incongruity at the heart of the Auditor's argument: "the Auditor asserts two irreconcilable positions: one, that his office's compilation of responses and summary are all that is required under Section 116.175; and two, that such quasi-clerical work rises to the level of an 'investigation' sufficient to bring Section 116.175 within article 4, section 13 of the Constitution. If, as the Auditor now asserts, an 'investigation' is a 'detailed inquiry or systemic examination,' then both of the Auditor's positions cannot be correct." L.F. II at 230 (Judgment at 25).

Since the trial court's ruling, the Auditor's position has grown even more extreme and contradictory. For the first time, the Auditor argues not only that his "process" meets the statutory requirement, but also argues (and therefore admits) that this "process" does not actually have him "independently assess the fiscal impact of a proposed initiative." Auditor Br. 12. Does the Auditor at least check to see whether the submissions he receives are correct? No. The Auditor now

closes that door as well, admitting that he "does no analysis or evaluation of the correctness of the proposed impact statements." *Id*. Surely, though, doesn't the Auditor try to ensure some bare minimum of accuracy? No. The Auditor now tells us that the "legislature labored under no fiction that the fiscal note and summary would meet some standard of accuracy." Auditor Br. 13.

These new positions stretch one step too far. Like Aesop's dog who reached for the bone in his own reflection, the Auditor's reach for an even more extreme interpretation of Section 116.175 dooms all of his arguments on appeal, both as a respondent on Mr. Allred's cross-appeal and as an appellant on the constitutional issue.

First, the Auditor's admissions that he fails to "independently assess" fiscal impact and "does no analysis or evaluation" mean that he can no longer defend the statutory "sufficiency and fairness" challenge under Sections 116.175 and 116.190. *Section 116.175 requires the Auditor to "assess" the fiscal impact.* Now the Auditor admits that he does not do this. Second, as discussed in the trial court's opinion and in more detail below, the constitutional requirement of an "investigation" is even more rigorous than the statutory provision for an "assessment." The Auditor's admission that he does not even "independently assess" fiscal impact under the lower statutory standard also dooms his constitutional argument.

Even without this recent admission, the trial court found based on the law and the facts that under Section 116.175, the Auditor was merely performing

quasi-clerical work and was not, in fact, performing investigations. *See* Point I, *infra*. And as discussed below, there was a second independent ground supporting the trial court's finding that the Auditor's preparation of fiscal notes and summaries is outside of the scope of his constitutionally enumerated duties: even if Section 116.175 did call for an "investigation," the Auditor's work must also have been an investigation that is "related to the supervising and auditing of the receipt and expenditure of public funds." Both as a matter of law and of fact, it is not. *See* Point II, *infra*.

Accordingly, for two independent reasons, both the facts and law demonstrate that the General Assembly did not constitutionally assign to the Auditor the quasi-clerical task of assembling fiscal notes and summaries about possible future fiscal impacts of proposed legislation. In the alternative, this Court could decide not to reach the facial validity of Section 116.175 and simply find that the Auditor's fiscal notes in this case are outside the scope of his authority because they were not an investigation. Under any combination of these possibilities, the trial court's judgment invalidating the ballot title must be affirmed.

ARGUMENT

I. THE TRIAL COURT CORRECTLY RULED THAT THE AUDITOR LACKS AUTHORITY BECAUSE THE ASSEMBLY OF A FISCAL NOTE AND SUMMARY IS NOT AN INVESTIGATION (Responds to all of Auditor's and JWJ's Briefs)

A. Standard of Review

The standard of review in this case depends on the precise question being considered,[4] so it is at different times "substantial evidence" or "*de novo*." On the circuit court's plain language review of Section 116.175, the standard is *de novo*; on the circuit court's findings that the Auditor's process was not an investigation, the standard is "substantial evidence."

The constitutional ruling appealed by the State and Intervenor-Defendants involves both factual and legal issues. *See* Jobs With Justice ("JWJ") Br. 24-25 (objecting that the trial court treated constitutional question as a "question about the facts."). That is because Mr. Allred argued, and the trial court found, that in addition to what can be readily gleaned from the plain language of the statute, the Auditor's *actual process in this case* failed to qualify as an "investigation." *See* L.F. II at 229-233 (Judgment at 24-28, which bases its conclusion on two

[4] On all questions relating to the constitutionality of the statute, Plaintiff Allred bore the burden of proof. *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011).

independent grounds, the language of Section 116.175 and the record evidence about the Auditor's process).[5]

In a recent opinion, this Court helpfully collected authority in explaining the process of sorting out factual and legal issues in the context of Supreme Court review of a trial court's judgment on a constitutional challenge to a statute:

> A claim of error on appeal may present a mixed question of law and fact. In such an instance, the reviewing court applies the same principles articulated above except that it is necessary to segregate the parts of the issue that are dependent on factual determinations from those that are dependent on legal determinations. "[W]hen presented with an issue of mixed questions of law and fact, a [reviewing court] will defer to the factual findings made by the trial court so long as they are supported by competent, substantial evidence, but will review de novo the application of the law to those facts." 5 Am.Jur. 2D *Appellate Review* § 631 (2012)… Therefore, it is a matter of deferring to the fact-finder in its assessment of the

[5] On the fiscal note sufficiency and fairness issues being appealed by Mr. Allred, which are the subjects of another brief, the only question is whether the circuit court correctly applied Missouri law on the uncontested facts regarding the materials the Auditor received. *See* Allred Opening Br. 42-45. For that reason, only *de novo* review applies there. *Id*.

> facts and then applying de novo review in determining how the law applies to those facts.[3] *White,* 321 S.W.3d at 307 ("When the facts of the case are contested, this Court defers to the trial court's assessment of the evidence.").

Pearson v. Koster, SC92317, 2012 WL 1926035 *4 (Mo. banc May 25, 2012) (subject to June 11, 2012 motion for rehearing on unrelated issues).

Accordingly, the circuit court's first independent ground for declaring that the Auditor exceeded his constitutional authority in preparing the fiscal note, a plain-language analysis of whether the statute calls for an "investigation," is reviewed *de novo*. The circuit court's second independent ground, his factual determination about the Auditor's process and its character as an "investigation," is reviewed on the more permissive "substantial evidence" standard.

B. As a Matter of Law, Section 116.175 Does Not Call for an Investigation and Therefore Assigns the Auditor Duties Outside of His Grant of Authority Under the Missouri Constitution

The circuit court correctly held that Section 116.175 is unconstitutional because it is not a law by which the General Assembly has called upon the Auditor to perform an "investigation." In other words, if Section 116.175 does call upon the Auditor to simply paste third party responses into a document, call it a "fiscal note," and then "compile" those responses into a 50-word "fiscal note summary," this is no "investigation."

1. The Constitution Requires that a Duty Assigned By Law at Least Rise to the Level of an "Investigation"

Why is an "investigation" a constitutional requirement? The plain text of article 4, section 13 requires that if "by law" the General Assembly assigns a duty to the Auditor not otherwise enumerated, it must not only meet the "related to" requirement of the last sentence, it must first rise to the level of an "investigation:"[6]

> He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other **audits and investigations required by law**, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. **No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds**.

Mo. Const. art. IV, § 13 (emphasis added).

[6] The Auditor has never argued (and could not argue) that the compilation of fiscal note responses or the preparation of a fiscal note summary is an "audit."

Article 4, section 13 is not merely a floor atop which new duties can be piled by implication, or a core around which a penumbra of financial-sounding duties can be added. Neither the Auditor nor JWJ so argue. Instead, it is the beginning and end of the Auditor's authority (or of the General Assembly's authority to add specific types of additional duties "by law"). "Words granting certain authority exclude other powers not expressly given." *Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996) (Committee on Legislative Research cannot prepare fiscal notes for initiative petitions because its powers are circumscribed by the constitution, which provides that it is "advisory to" the General Assembly and not to the people of the state).

Accordingly, even before a court scrutinizes a duty assigned "by law" to ensure that it complies with the last sentence of article 4, section 13, it must first ask whether that law calls for an "investigation."

2. An "Investigation" Is a Detailed Inquiry or Systematic Examination

The dictionary definition pressed by the Auditor and utilized by the trial court—a fair one that is not disputed by any party on appeal—is "a detailed inquiry or systematic examination." L.F. II at 231.

As the trial court recognized, the dictionary definition of the term "investigation" should be used. *See, e.g., State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228 (Mo. banc 1997) (in deciding whether a statute giving the Joint Committee on Legislative Research the power to conduct a

"management audit" encroached upon the Auditor's power under article 4, section 13 of the constitution to "post-audit," looking to Webster's dictionary for the "plain and ordinary meaning" of the constitutional words, "post-audit").

Using this same dictionary,[7] to "examine" is: "1.a. to observe carefully or critically; inspect"; "1.b. to study or analyze"; "2. to test or check the condition or health of."; "3. to determine the qualifications, aptitude, or skills of by means of questions or exercises"; and "4. To question formally, as to elicit facts or information; interrogate." L.F. II at 231.

Reading these definitions together, the Auditor must not only make this sort of inquiry or examination, it must also be "detailed" and "systematic." As discussed below, Section 116.175 does not meet this definition.

3. Section 116.175 Does Not Call for an Investigation

The plain language of Section 116.175 calls for the Auditor to (1) "assess" fiscal impact; (2) state an "estimate" of "costs or savings, if any, to state or local government entities;" and (3) "summarize the fiscal note in language neither argumentative nor likely to create prejudice for or against the proposed measure." It does not, however, call for an "investigation." In relevant part, the statute provides as follows:

[7] The Auditor relied upon the American Heritage Dictionary of the English Language, Fourth Edition (2003). http://www.thefreedictionary.com/investigation.

> 1. …upon receipt from the secretary of state's office of any petition sample sheet, joint resolution or bill, the auditor **shall assess the fiscal impact of the proposed measure**. The state auditor *may consult* with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement of fiscal impact estimating the cost of the proposal…provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.
>
> 3. **The fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities.** The fiscal note summary shall contain no more than fifty words, excluding articles, which **shall summarize the fiscal note in language neither argumentative nor likely to create prejudice either for or against the proposed measure**.

Using the plain dictionary meaning of "investigation," Section 116.175 simply does not call for one. The trial court and Auditor agreed that under existing Court of Appeals precedent, Section 116.175 requires far less than an "investigation." The trial court and Auditor both believed that "precedent from the court of appeals" interpreting Section 116.175 governed the case. *See* L.F. II

at 221.[8] The trial court ruled that under this precedent, two things were sufficient for the Auditor's work product to comply with Section 116.175: (1) "submissions of fiscal impact contained in the fiscal notes are listed verbatim as received from the submitting entities or individuals;" and (2) "[i]n those submissions, there is supporting material for the State Auditor's statements in the fiscal note summaries." *See* L.F. II at 220. The Court also held that Section 116.175 "does not at any point require the Auditor to summarize or explain his analysis." *Id*.

[8] The primary decision cited by the Auditor and circuit court was *Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 582 (Mo. App. W.D. 2010). The court of appeals interpreted Section 116.175 to "authorize" the Auditor to "send inquiries" to entities "having knowledge pertinent to the proposed legislation." *Id*. The court of appeals also apparently understood the Auditor's process to entail a method that it considered "independently assessing" cost or savings of a proposal, which consisted of (1) sending out inquiries and placing responses in the fiscal note if they are complete and reasonable; (2) obtaining clarification from the entities if necessary; and (3) placing less weight on unreasonable responses when drafting the summary. *Id*. At least on its understanding of the facts in that case, the court disagreed that the Auditor's "current process" could be characterized as simply "scrivener's work" with no independent assessment. *Id*.

Further, the Auditor was not required to "go outside the submissions he received and do his own independent analysis and research…" L.F. II at 221.

Although the Court of Appeals may not have realized the implications of its interpretation of Section 116.175, two years later, they are clear enough. The "assessment" required by Section 116.175 has turned into a process whereby certain individuals voluntarily send written comments to the Auditor, the Auditor pastes them verbatim into the fiscal note, and the Auditor's fiscal note "summary" is approved so long as it contains items that can be located somewhere in the fiscal note. *See* L.F. II at 220.

Decisions like *MML I* (and like that of the trial court on the sufficiency issue) have now emboldened the Auditor to edge further than ever before. He now claims and admits that he does not "independently assess the fiscal impact of a proposed initiative" and "does no analysis or evaluation of the correctness of the proposed impact statements." Auditor Br. 12.

If it is true that the Auditor *is complying* with Section 116.175 when (as in this case) he refuses to "independently assess" fiscal impact and refuses to do any "analysis or evaluation of the correctness of the proposed impact statements," (which is the only raw material he receives from third parties), then as a matter of law, the Auditor is not conducting (and Section 116.175 does not require) anything like a "detailed inquiry or systematic investigation." Simply put, Section 116.175 does not require an "investigation."

4. The Conclusion that Section 116.175 Does Not Call for an Investigation Can Be Based Upon the Auditor's Own Interpretation of the Language of the Statute and Court of Appeals Authority, not on the Facts Regarding the Auditor's Specific Work Product in this Case

Although the facts of this case show that the Auditor's process and work product were not an "investigation," this conclusion should hold true for every fiscal note. The Auditor affirmatively disclaims his duty to conduct an "independent assessment" or even an "analysis or evaluation of the correctness of the proposed impact statements." Auditor Br. 12. While the Auditor could maintain his "no independent assessment" policy and haphazardly and accidentally stumble into a "good" fiscal note even without conducting any assessment or analysis, that is not the question. Rather, the question is whether the Auditor's fiscal note and summary process under Section 116.175 is actually an "investigation." Using the Auditor's own admissions regarding the process and assumptions he believes the law authorizes him to use every time he prepares a fiscal note, he is not conducting an "investigation." Unless Section 116.175 can be read to require a "detailed inquiry and systematic examination" far more rigorous than what the Auditor did here, it does not call for an "investigation" and is therefore unconstitutional.

C. As a Matter of Fact, When the Auditor Performs His Duties Under Section 116.175, He Does Not Perform an Investigation

The Auditor's conduct in preparing the fiscal note in this case—as found by the trial court—more than bear out the Auditor's claims about what the plain language of Section 116.175 (as interpreted in the *MML* cases) requires or allows him to do. The Auditor made no pretense of undertaking an "investigation," a "detailed inquiry" and "systematic examination." Substantial evidence—indeed, the overwhelming weight of the evidence—supports the trial court's finding that "[T]he facts showed that the Auditor's work was not an investigation." L.F. II at 231. As the trial court noted, the Auditor's actual process was simply the verbatim pasting of responses and the compilation of those into 50 words or less, "something closer to clerical work." L.F. II at 232.

1. The Process the Auditor's Office Used on this Fiscal Note Mirrors Its Normal Process, and Was Not An Investigation

First, the Auditor has finally openly admitted to what the testimony of his single fiscal note drafter has repeatedly established under oath: all the Auditor does is paste third-party submittals into the fiscal note, as he "does no analysis or evaluation of the correctness of the proposed impact statements." Auditor Br. 12. The Auditor also admits that the summary is not, in fact, a real analysis of what he receives, it is only a "compilation" to "summarize the various proposals, if you will, from high to low." Auditor Br. 13.

A single employee in the Auditor's office, Jon Halwes, performs the substantive work of preparing fiscal notes and summaries. Tr. 29:14-20. No other person in the Auditor's office, including the Auditor himself, typically reviews Mr. Halwes' work, and the same was true with respect to the petitions submitted by Mr. Grant. Tr. 30:11-17. Mr. Halwes had been working on petition fiscal notes for less than a year when he received the minimum wage petitions; most of Mr. Halwes' training had been "on the job" working by himself. Tr. 30:18-31:5.

Mr. Halwes and the Auditor's office have no manuals, rules, or procedures for preparing fiscal notes except for their unwritten interpretation of the text of Section 116.175, RSMo. Tr. 31:6-15. The Auditor's primary unwritten rule is that, with rare exceptions, it pastes verbatim into the fiscal note the fiscal impact responses it receives from state and local agencies, proponents, and opponents, making as few changes as possible. Tr. 31:16-32:16.

The Auditor undertakes absolutely no "independent analysis or research" other than to paste the responses into the fiscal note for a petition. *See* L.F. II at 221; *see also* Party Stipulations, Appendix to Allred Opening Brief A50-51 ¶¶ 19-23. The Auditor's office admitted that it sometimes followed-up with an entity when the entity's response seems "incomplete" or the issues "directly impact them." Tr. 89:23-90:17. It claims to do this on a "case-by-case basis." Tr. 90:18-19. The Auditor's guiding light is the office's own determination as to whether data from the entity will be "relevant" to the "voters." Tr. 34:4-35:1; 66:7-12; 68:1-6; 71:19-72:5; Tr. 73:3-16 (in response to question of whether Auditor's

office should have tried to determine if costs were only slightly over $1 million, or were "$10 or $20 million," Mr. Halwes testified, "I would say that we put in the work to comply with the requirements of 116.175, and to the extent that we're providing relevant information to the voters, we did that.").

On direct examination, Mr. Halwes admitted that his office employs no objective or discernible subjective criteria in deciding whether given information will be "relevant to the voters." Tr. 73:25-74:20. Counsel asked Halwes what process he used to decide what he believed was "relevant to the voters," and asked, "ultimately isn't it just guesswork?" *Id*. Rather than responding with any objective or even subjective criteria, Halwes tellingly answered, "Well, everything that we're doing here is to some extent guesswork." *Id*.

2. The Auditor Made No Serious Effort to Investigate, Assess, or Estimate the Direct Cost that the State and Local Entities Would Incur as a Result of an Increase in the Minimum Wage

The Auditor's office intentionally failed to undertake a "detailed inquiry" and "systematic examination" of what it admitted was the most important part of the fiscal note: the direct cost to state and local government entities.

The issue of direct cost of wage increases paid by state and local government entities was the Auditor's "key" issue for purposes of the fiscal note and summary. Tr. 65:20-66:2. First, Mr. Halwes sent requests for fiscal impact estimates to a pre-set list of approximately 25 state agencies and 25 localities or

political subdivisions. Tr. 80:5-81:4; L.F. I at 44, 58 (showing that approximately 25 state agencies and 25 cities, counties, school districts, and other subdivisions were contacted). Mr. Halwes believes that the selected local subdivisions represent a "cross section" of the state, but admitted that he doesn't know how they were chosen. Tr. 80:24-81:4. Mr. Halwes admitted he didn't know how many state and local entities employ minimum wage workers, or even what proportion of state and local entities employ minimum wage workers. Tr. 66:13-67:10. Mr. Halwes admitted that the number of state and local agencies and subdivisions that employ minimum wage workers could be in the hundreds, but he did not know. Tr. 67:6-14.

Further, Mr. Halwes admitted that he never intended to use his twenty-five-entity "cross-section" in the usual manner—to make a projection, extrapolation, or estimate regarding the size or characteristics of the "whole." Tr. 68:21-69:5. When asked why the Auditor never makes a projection or extrapolation as part of the fiscal note process, Mr. Halwes simply stated, "I can't answer that question." *Id*. Nonetheless, Mr. Halwes recognized from the outset that by failing to make any projection or extrapolation from the "cross section," the fiscal note and summary would necessarily under-report a broad-based cost like the minimum wage: he "knew from the local governments that didn't respond to us that clearly there would be more." Tr. 92:2-5.

The Auditor's one and only request to the twenty-five entities, itself a subset of the potentially hundreds of entities that employed minimum wage workers,

netted a total of seven responses. The seven responses (in addition to the Office of Administration, which purported to respond for all state-level agencies) were as follows:

City of Columbia	$140,885.01
City of Jefferson City	$98,947.00
City of St. Joseph	$102,350.00
City of St. Louis	failed to address direct costs
Jasper County	$0 (all workers exceeded the minimum)
Linn State Technical College	$25,000
Metropolitan Community College	$405,000
Office of Administration	$540,000 (or "over" this amount)

L.F. I at 45-48, 59-62.

This smattering of responses alone added up to over $1.3 million. Mr. Halwes performed no independent analysis, projection, or extrapolation, and reached no logical or expert conclusion based upon these responses. Instead, he simply added the seven numbers together and, in the fiscal note summary, stated that costs to state and local entities "will exceed $1 million."

Mr. Halwes made no effort to follow up with the state's largest cities, Kansas City, Springfield, or St. Louis, which either failed to respond at all or which failed to address the issue in their response. Mr. Halwes made no effort to follow up with large community colleges and universities, such as the University of Missouri, or

with any of the seven large counties who failed to respond. L.F. I at 56, 70; Tr. 73:3-13.

Indeed, Mr. Halwes did not even attempt to find out why certain large public entities failed to respond to his first and only request. Tr. 70:10-71:3. With respect to the City of St. Louis, which the Auditor's office had errantly assumed was the largest city in Missouri (Tr. 69:6-17), Mr. Halwes later claimed he simply "didn't see a need to" make any contact after the City of St. Louis inexplicably left off a "direct cost" number from its narrative fiscal impact statement. Tr. 71:3. This was despite the fact that the office recognized the City of St. Louis was "potentially" the most relevant city in the state (Tr. 71:4-6), because "the bigger the city the more relevant the result it gives you in terms of costs." Tr. 69:14-17.

In contrast to its use of the non-statutory "relevance to voters" criterion in failing to seek data from large public entities to determine direct public costs, the Auditor's office "choose[s] not to enforce" a statutory "10-day limit" for receiving fiscal impact statements of petition proponents. Tr. 82:14-22. Mr. Halwes claims that it disregards the ten-day deadline because "the more information that we can obtain the better fiscal note and fiscal note summary we can have, and if we get it within the time frame to allow us to analyze it, then I'm going to include it." *Id*.

Here, the proponents of the minimum wage petitions submitted a fiscal impact statement several days after the ten-day deadline, which ran on October 15, 2011, via a Thursday, October 20, 2011 email from Lenny Jones, identified as a political operative of the Service Employers International Union ("SEIU"). *See*

L.F. II at 209. This left less than three business days before both the fiscal note and fiscal note summary had to be completed and turned in.

The proponents estimated—and the Auditor then agreed and adopted the assumption—that Missouri employers, both public and private, would pay out an additional $360 million each year as a result of the minimum wage increase. L.F. I at 50, 64. But of that $360 million combined payout by private and public employers, the Auditor's "direct cost" statement assumes that state and local government agencies and political subdivisions' share is merely some amount that "exceeds" $1 million. The Auditor provided no evidence at trial that after accepting this late submission from the proponents, Mr. Halwes made any effort to question whether his "exceeds $1 million" statement, derived by adding together just seven responses, was a reasonable estimate for the public share of the $360 million public-and-private payout.

The evidence at trial showed that direct costs to state and local agencies and political subdivisions are not close to $1 million. Mr. Allred's expert witness, Dr. David Macpherson, testified that the true cost is over $16 million per year. Tr. 149:10-151:4. Dr. Macpherson was able to use publicly-available data from the Current Population Survey ("CPS") to make a reliable calculation, and did not require a complete roster of every Missouri worker. Tr. 150:16-151:13. Dr. Macpherson's entire analysis on all parts of the fiscal note, of which his "direct cost" work was only one part, took just 12 to 15 hours. Tr. 141:14-17.

Given all of this evidence, the trial court cannot help but have concluded that the Auditor performed (and performs) "something closer to clerical work" under Section 116.175. L.F. II at 232.

Tellingly, the Auditor's defense is not that these facts are incorrect, that the investigation didn't actually unfold in this matter, or that some accounting or auditing principle justifies his particular method. Instead, it is that the insufficient methods detailed above *are all that Section 116.175 requires*. If the Auditor is right on this point of law, then Section 116.175 does not "require" an "investigation" and the trial court's factual finding and judgment must be affirmed.

II. THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE AUDITOR LACKS AUTHORITY BECAUSE ASSEMBLING THIRD PARTIES' PREDICTIONS OF FUTURE FISCAL POSSIBILITIES IS NOT RELATED TO THE SUPERVISING AND AUDITING OF THE RECEIPT AND EXPENDITURE OF PUBLIC FUNDS

(Responds to all of Auditor's and JWJ's Briefs)

A. Standard of Review

The standard of review mirrors the standard on Point I; legal conclusions are reviewed *de novo* and factual findings are reviewed under the substantial evidence standard.

B. This Court Has Previously Recognized that the Constitution of 1945 Enacted "Related to" Clauses in Order to Limit the Power of the Secretary of State, Treasurer, and Auditor, and to Focus Power on the Office of the Governor

As the Auditor is forced to admit, the "related to" clause at issue in this case was part of a program of reforms implemented in the 1945 constitution to limit the dispersal of duties among constitutional officers and concentrate more power in the governor's office. *See* Auditor Br. 17. This is significant.

In light of this legislative history, this Court has recognized that, unlike other constitutional provisions, the "related to" clauses are not to be construed as broad grants of power, "but rather are words of restriction." *Farmer v. Kinder*, 89 S.W.3d 447, 453 (Mo. banc 2002) (striking down statute allowing Treasurer to sue to "enforce delivery" of "unclaimed property" because it violated "related to" clause in article IV, section 15, which states that "no duty shall be imposed on the state treasurer by law which is not **related to** the receipt, investment, custody, and disbursement of state funds…") (emphasis added).

Interestingly, although the Auditor's brief discusses a 50-year-old case cited by this Court in *Farmer* (and even presents an example about "unclaimed property," the subject of *Farmer*), the Auditor fails to discuss or even mention *Farmer* itself. *See* Auditor Br. 17. The case is directly on point.

In *Farmer*, State Treasurer Nancy Farmer sued several Cole County judges and receivers with custody over four funds that she alleged were "unclaimed

property" under Missouri's Uniform Disposition of Property Act in Chapter 447, RSMo. *See Farmer*, 89 S.W.3d 447, 448-449. This Court observed that in 1993, the General Assembly had transferred the power to enforce delivery of certain types of unclaimed property from the Director of Economic Development to the Treasurer. *See* § 447.575, RSMo. (1993). *Id*. The Treasurer apparently argued that "enforcing delivery" of such funds was a task that was obviously "related to" the "receipt, investment, custody, and disbursement of state funds…" *Id.*

This Court disagreed, noting that the Treasurer was essentially to act as custodian of state funds, and while tasks "related to" this grant of power were constitutional, the grant excluded powers close to, but not included within, custodial duties, such as the duty of collection. *Farmer*, 89 S.W.3d at 453. The Court explained:

> The treasurer would have us construe section 15 as if it were a broad grant of power to undertake actions not limited to those related to receipt, investment, custody and disbursement of state funds and funds received from the United States government. But, the words used to describe the treasurer's powers do not broaden or expand the treasurer's authority, but rather are words of restriction. The constitution enumerates very specific powers that the treasurer may exercise and, then, specifically provides that *no* duty not related to those specifically enumerated powers may be exercised by her.

Id.

Relevant here, this Court located its interpretation of the Treasurer's "related to" limitation within an overall program of reform that also applied to the Auditor and Secretary of State:

> The narrow grant of authority to the treasurer is in keeping with the narrow grant of authority by the 1945 constitution to certain other elected officials. Just as article IV, section 15 sets limits on the power of the treasurer, so article IV, section 13 provides: "[n]o duty shall be imposed on [the state auditor] by law which is not related to the supervising and auditing of the receipt and expenditure of public funds." Article IV, section 14 similarly provides "no duty shall be imposed on [the secretary of state] by law which is not related to his duties as prescribed in this constitution." There were no similar limitations in the 1875 Constitution, and this Court has previously recognized that it was to correct this situation that these limiting provisions were added to the 1945 constitution…

Id. Reviewing the constitutional debates, this Court further observed that the convention delegates drafted the 1945 constitution

> with an eye towards their concern that power had been too widely distributed among a variety of elected officials under the 1875 constitution and that a focusing of more executive power in the office of the governor and his or her appointees might lead to more

> effective government. One way the 1945 constitution sought to accomplish this goal was by precluding the expansion of the state treasurer's role beyond that of custodian of state funds **and by similarly limiting the power of the state auditor and secretary of state.**

Id. at 453-454 (emphasis added).

Although Treasurer Farmer did not have a bad argument that the "collection" of funds was both logically and causally "related to" the "receipt" of funds, she ultimately did not prevail. Here, the Auditor is on far worse ground. As discussed below, the forecasting and prediction of future collections or costs (especially as the Auditor interprets those tasks, as mere clerical pasting of other agencies' responses) is neither logically nor causally related to the Auditor's true constitutional duty and core competency: the supervising and auditing of receipts and expenditures that have already occurred.

C. The Compilation of Fiscal Note and Fiscal Note Summary Is Not Logically or Causally Connected to Anyone's "Supervising" or "Auditing" the "Receipt or Expenditure of Public Funds"

As a matter of law and of fact, the trial court was correct that the Auditor's verbatim pasting of third-party submissions into the fiscal note, and "compilation" of those responses in his fiscal note summary, is not "related to the supervising and auditing of the receipt and expenditure of public funds." Even if the Auditor's performance of this clerical work qualifies as an "investigation," the fact that such

clerical work is not "related to" two specific aspects of "the receipt and expenditure of public funds," *i.e.*, "supervising" or "auditing" them, is an independent ground for affirming the trial court.

The Auditor admits that the phrase "related to" requires a "logical or causal connection between." Auditor Br. 14. But there is no logical or causal connection between pasting into a "fiscal note" certain agencies' predictions about how future legislation might affect their future costs or revenues, and the Auditor's actual "supervising" or "auditing" of "the receipt and expenditure of public funds." These two tasks are neither logically nor causally connected because they (1) consider different time periods, and (2) use different methods to reach different goals.

1. Different Time Periods: The Past Versus the Future

a. Supervising and Auditing Require Reporting on and Reacting to Real Things that Happened or Are Happening in the Past or Present

Neither "supervising" nor "auditing" of the receipt and expenditure of public funds is a forward-looking task. Both duties are fundamentally about the present or the immediate past, not future predictions. "For purposes of article IV, section 13, an audit is a 'methodical examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings.'" *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 232-233 (Mo. banc 1997) (using dictionary definition, and noting that even a

"post-audit" cannot go "beyond obtaining financial information"). One can neither "supervise" nor "audit" a "situation or condition," or a receipt or expenditure, that is essentially just a prediction based upon a particular view of the legal effect of a petition or its economic effect on the state: these impacts can be years into the future and may never occur.

The fact that the Auditor's supervising and auditing of expenditures or receipts may happen a year or two or three after the governor, budget director, or agency has predicted (or guessed) that those funds may flow through the state tills does not make the task of prediction and estimation "related to" the task of supervising and auditing. As in *Farmer*, this Court should recognize that the constitution provides that other officials are responsible for the task of prediction, forecasting, and budgeting. *Farmer*, 89 S.W.3d at 453 (Treasurer's duty of "receiving" and acting as "custodian" of funds was not "related to" the task of "enforcing the receipt" or "collecting" those same funds, as this was the province of the Director of Revenue). The trial court's judgment on this point was sound.

b. The "Budget" Fallacy: the Auditor Does Not Budget for the State or Political Subdivisions

The Auditor may respond[9] that the word "budgeting" appears in article IV, section 13, and does involve forecasting the coming year or years. However, the Auditor has no responsibility for "budgeting;" his office is at least two degrees

[9] *See also* JWJ Br. 21-22.

removed from the actual process. The Auditor "shall establish appropriate systems of accounting for the political subdivisions of the state, [and] supervise their budgeting systems…" Mo. Const. art. IV, § 13. Thus, this duty (1) only applies to "political subdivisions;" (2) only addresses budgeting "systems;" and (3) only states that the Auditor should "supervise" the subdivisions' "systems."

For this reason, it should not be surprising that the General Assembly's laws have nothing to say about the timing and form of the Auditor's "budgets" for the state or any of its subdivisions. Instead, the Auditor is simply told to "develop or approve adequate forms" for counties to prepare their own budgets. *See, e..g.* § 50.745, RSMo. (auditor's forms for third and fourth class counties); *compare* § 29.180 (auditor establishes uniform accounting "system" in cooperation with state budget director, and also establishes "systems" of accounting for counties). County officials, not the Auditor, actually prepare their budgets. *See, e.g.*, § 50.540, RSMo. (county budget law, which provides no role for Auditor).[10]

[10] Tellingly, neither the Auditor nor JWJ cite any statute in their appellate briefs to support their claim that the Auditor actually engages in budgeting or forecasting for the state or its political subdivisions, either when making "investigations" or otherwise. JWJ speculates that "investigations" *could* be forecasts, but in support of its argument, cites no law (or even an example of an activity) calling for the Auditor to make a "detailed inquiry" or "systematic examination" of things that may never occur. On the other hand, examples abound of the Auditor's salutary

With respect to the state itself, the Auditor plays no role in forward-looking budget analysis, estimation, or extrapolation. Consistent with the 1945 constitutional reforms that placed more power in the hands of the governor, the budget process "begins and ends with the Governor." *Missouri Health Care Ass'n v. Holden*, 89 S.W.3d 504, 508 (Mo. banc 2002).[11] As the year unfolds, it is a

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efforts on behalf of taxpayers in conducting backward-looking "investigations." These may not qualify as an audit, but fulfill the Auditor's core competency and duty of verifying the accountability of public officials for public funds. They are frequently used to aid law enforcement or uncover public wrongdoing. *See*, *e.g.*, *Farnsworth v. Mo. Dep't of Corrections & Human Resources*, 747 S.W.2d 180, 187 (Mo. App. W.D. 1988) ("Special Review" of Auditor's office was within its authority, helped identify problems with prison farm, and was used to discharge director); *State ex rel. Thomas v. Olvera*, 987 S.W.2d 373 (Mo. App. W.D. 1999) (State Auditor's office "investigation" used to uncover mis-recording of checks by recorder of deeds, leading to her removal through *quo warranto* proceeding).

[11] In its misguided attempt to show that budgeting does not belong to any other constitutional office, and so must rest with the Auditor, JWJ inexplicably fails to cite the key provision of the constitution that deals with the budget process:

> The governor shall, within thirty days after it convenes in each regular session, submit to the general assembly a budget for the ensuing appropriation period, containing the estimated available

"dynamic process" requiring corrections "as actual revenues differ from estimates." *Id*. *See also* § 33.210 (budget director "shall assist the governor in the preparation of the budget" and establish a "performance-based budgeting system"). It is the Governor, budget director, and executive agencies, not the Auditor, who manage that process. To the extent that the Auditor or JWJ suggest that the Auditor is even marginally involved in budgeting or in any forward-looking estimates of revenues and expenditures, the constitution, statutes, and case law conclusively establish the contrary.

c. It Would Be Folly to Prepare Budgets or Forecasts Using the Auditor's Non-Analysis

Given the Auditor's position on what it actually does under Section 116.175, it would be folly to involve the Auditor in any kind of analytical process calling for a forward-looking review or estimate. Incredibly, the Auditor categorically refuses to perform extrapolations or estimates—the bread and butter of forward-looking. Tr. 68:21-69:5. This is not because the Auditor has made a

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> revenues of the state and a complete and itemized plan of proposed expenditures of the state and all its agencies, together with his recommendations of any laws necessary to provide revenues sufficient to meet the expenditures.

Mo. Const. art. IV, § 24. The provision makes no mention of the Auditor.

reasoned decision that extrapolations or estimates should never be used; when asked why the Auditor never makes a projection or extrapolation as part of the fiscal note process, Mr. Halwes simply stated, "I can't answer that question." *Id*.

Additionally, the Auditor unabashedly relies almost exclusively on the Office of Administration and other agencies who report to the executive branch's real budgeting authority, the Governor, but then openly admits to do "no analysis or evaluation of the correctness of the proposed impact statements…" Auditor Br. 12. Indeed, the Auditor would not "independently assess the fiscal impact of a proposed initiative" at all. *Id*. Finally, the Auditor claims there is "no fiction that the fiscal note and summary would meet some standard of accuracy…" Auditor Br. 13. Given the Auditor's open repudiation of the very sort of forward-looking analysis he claims he could perform and complete reliance on the Office of Adminstration and other executive branch agenices, is it reasonable to read a "forecasting" and "budgeting" duty into article IV, section 13? Under *Farmer*, the answer is "no."

2. Different Goals Dictate Different Methods: Making Predictions Based on Guesswork Regarding Voters' Beliefs, Versus Holding Officials Accountable Based on Precise and Thorough Investigations of Financial Transactions

Mr. Halwes was correct that if his goal is predicting future fiscal impacts, and only reporting the estimated impacts it believes would be "relevant to voters," then "everything that we're doing here is to some extent guesswork." Tr. 73:25-

74:20. This sort of vague, standardless, and even somewhat politically-contingent prediction might be an appropriate goal for other government actors. However, it is foreign to everything else the Auditor does: to "verify the accountability" of public officials who receive and spend tax dollars, *regardless* of what the voters believe is "relevant." *See* 15 CSR 40-1.010.

To underscore the distinct goals of these two types of activities, consider the Auditor's core auditing and examination function. The Auditor is required to furnish reports of both audits and examinations of public entities under Section 29.270, RSMo. The reports are to "set[] out in detail the findings as to the collection and disbursements of public funds and the mode of bookkeeping and accounting in force in such institution," and shall include "recommendations as may be proper." *Id*. If, in fulfilling its auditing and examination duties and rendering reports under Section 29.270, RSMo, the Auditor's office were to suggest that instead of generally accepted auditing standards for public entities, it was using methods that, as with fiscal notes, were "to some extent guesswork," the hue and cry would be deafening. The same would be true where the Auditor's investigations were being used to convict or remove public officials from office, as in *Olvera* and *Farnsworth* cases. *See* footnote 10, *supra*.

An Auditor's investigations and audits have serious consequences, and Missourians expect them to be based upon the various professional and legal standards set forth in Chapter 29, RSMo., and the Auditor's own regulations. These call for, *inter alia*, a thorough review of documents and information to

which the Auditor had "free access" under Section 29.130, RSMo. The Auditor's other duties, such as establishing "appropriate systems of accounting" for state public officials and subdivisions, and "supervis[ing]" political subdivisions' "budgeting systems," are simply means to help public entities establish accountability on their own and in the first instance before they are subject to audit and examination. *See* Mo. Const. art. IV, § 13. But the core goal of the office does not change: "In auditing Missouri offices, agencies and political subdivisions, the auditor verifies the accountability of program administrators to the people of Missouri." 15 CSR 40-1.010.

Foreign to article IV, section 13 is the goal of providing predictions and forecasts about the future impact of laws, using "guesswork" to decide what parts of the prediction will be "relevant to voters" in a given election. Other officers whose constitutional duties are more suited to the rough and tumble of the budget process and the politics of prediction regarding policies, legislation, and fiscal notes might be candidates for the fiscal note job.[12] But it is not a job for the

[12] The Auditor seems to invite this Court to use a speculative process of elimination, pointing out perceived flaws in having the Governor or other officials prepare a fiscal note. *See* Auditor Br. 11-12. The issue of who should replace the Auditor in preparing fiscal notes is not before this Court and is an issue for the legislature. But if the fiscal note can involve the mere pasting of voluntary responses into a longer document which can then be "summarized" in 50 words,

constitutional official whose primary goal is to stand apart from the concerns of the "voters" and focus on verifying that public officials have been accountable with public money.

D. The Facts of this Case Are Important Because They Demonstrate that the Auditor Is a Constitutional Fish Out of Water When He Must Guess What Future Impact Statement Will Be "Relevant to Voters" But Refuses to Use Any Investigatory or Analytic Tools

While both bases of the trial court's decision can be sustained simply by comparing article IV, section 13 to the statutes and the Auditor's admitted practices in complying with the statutes, the facts of this case are important. They paint a picture of what happens when a statewide office of constitutional dignity is assigned a task for which it is ill-suited.

Nonetheless, JWJ appears to argue that the court's findings cannot have been based on facts, since it presents purely a legal question. There are several problems with this argument.

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there is no reason that any number of officials could not perform this quasi-clerical task.

1. JWJ's Appeal Relies on the Factual Record

First, just before making its "no facts" argument, JWJ implicitly violates its own position by citing to Mr. Halwes' hopeful claim at trial that he uses "the same skills in drafting fiscal notes that [he does] in performing audits." JWJ Br. 23 (citing Tr. 78). On the facts, the trial court did not agree. That is because the great weight of the evidence showed that Mr. Halwes uses nothing like a method or skill that would be used in an audit, performing no independent analysis whatsoever: "At trial, however, the Auditor's representative admitted that he simply pasted voluntary responses verbatim into the fiscal note, and then summarized these receipts in fifty words without making any follow-up inquiry to any of the voluntary responders." L.F. II at 231. As a matter of fact, this is "something closer to clerical work." L.F. II at 232. *See also* Point I.C, *supra*.

Nor is there any factual record to back up JWJ's hopeful claim that its reading of the constitution makes sense because the Auditor's office is "knowledgeable about budgeting, accounting, and forecasting regarding public funds," or that it is "uniquely qualified" to make forecasts about fiscal impacts of new laws. JWJ Br. 23. Indeed, JWJ's brief contains no record citation to support these two statements. As discussed above, the trial record showed that if the Auditor's office does have these unique skills, it adamantly refuses to use them in the fiscal note process. The Auditor's brief drops the ultimate punctuation mark by proudly disclaiming any "analysis or evaluation of the correctness of the

proposed impact statements," any effort to "independently assess the fiscal impact," and any "standard of accuracy." Auditor Br. 12-13.

2. *MML I's* Conclusions About the Auditor's Procedures Are Based on Facts, not Merely on a Reading of Section 116.175

Second, JWJ posits that facts do not matter because the approved procedures are set in stone, and "Section 116.175, RSMo., as interpreted by *MML I*, defines the type of investigation that is required for fiscal notes." JWJ Br. 25. That cannot be correct. *MML I* was based not on transcendent principles of logic or law, but on its own set of facts regarding a three-part process which does not appear in Section 116.175, but was supposedly used by the Auditor, both in that case and in all other cases. *See Missouri Municipal League v. Carnahan* ("*MML I*") 303 S.W.3d 573, 582 (Mo. App. W.D. 2010). Now, the facts show that the Auditor's supposed three-part process is not always followed, or if it is followed in form, is consistently executed in a manner that does not comport with the grant of power to the Auditor.

For example, contrary to *MML I*'s assurance that the Auditor sends inquires to entities having "pertinent knowledge" and then follows up if anything is unclear, Mr. Halwes did not even attempt to find out why certain large public entities failed to respond to his first and only request. Tr. 70:10-71:3. With respect to the City of St. Louis, which the Auditor's office had errantly assumed was the largest city in Missouri (Tr. 69:6-17), Mr. Halwes later claimed he simply "didn't see a need to" make any contact after the City of St. Louis inexplicably left off a

"direct cost" number from its narrative fiscal impact statement. Tr. 71:3. This was despite the fact that the office recognized the City of St. Louis was "potentially" the most relevant city in the state (Tr. 71:4-6), because "the bigger the city the more relevant the result it gives you in terms of costs." Tr. 69:14-17. Apparently, the Auditor's ever-shifting and subjective "relevant to the voters" analysis guides the work of the office and leads to irrational conduct.

3. JWJ's Disregard for the Facts Misunderstands the Trial Court's Alternative Grounds, Which Provide Several Bases for this Court's Decision

This Court could affirm the trial court purely by comparing the text of article IV, section 13, to the face of Section 116.175, which Appellants urge the Court to interpret using *MML I*. Under this analysis, Section 116.175 is facially unconstitutional for either or both of two independent reasons: (1) it does not call for an investigation; and (2) it is not related to supervising or auditing the receipt or expenditure of public funds. Were the Court to agree with either proposition, JWJ is correct that facts would be irrelevant, and the trial court would be affirmed. This is the simplest outcome.

However, the Auditor has continually insisted that Section 116.175, RSMo., allows it to perform minimal work and no "independent analysis" whatsoever, even up to and including the failure to make a meaningful effort to determine the direct cost of a substantial increase. These bold statements from the officer charged with enforcing the statute leave this Court with three additional options

for affirming the trial court's ultimate result, all of which can depend on the facts found by the circuit court and none of which reach the trial court's alternative "related to" ground.

First, this Court could decide that Section 116.175 cannot be interpreted as demanded by the Auditor and as understood by the trial court and also remain constitutional—at least with respect to the "investigation" requirement.[13] This would require reversing *MML I* and holding that the Auditor must perform a "detailed inquiry and systematic examination" when he performs his duties under Section 116.175. Applying this more rigorous standard to the facts found by the trial court regarding the Auditor's "quasi-clerical" approach to the fiscal note, this Court would affirm the trial court's vacatur of the fiscal note and summary, and its concomitant striking of the fiscal note summary from the official ballot title. This Court would have affirmed the trial court's ultimate result on statutory rather than constitutional grounds.

Second, this Court could agree that Section 116.175 must be construed as demanded by the Auditor and as determined by the circuit court, and that based upon the facts and the Auditor's unequivocal admissions about how his office applies the statute in all cases, it is unconstitutional because it asks the Auditor to

[13] Were the Court to agree that the Auditor's fiscal note and summary violate the "related to" clause, the "investigation" issue would be academic.

perform a quasi-clerical task that involves no analysis and falls short of an investigation.

Third, this Court could decide that Section 116.175 is susceptible of varying interpretations and is not facially unconstitutional,[14] but that as applied by the Auditor in this case (and, apparently, in most recent cases), it is unconstitutional because the Auditor does not conduct a detailed inquiry and systematic examination. This would make Section 116.175 no different from any number of laws that may not be unconstitutional in all of their applications, but are unconstitutional as applied to a specific factual situation. *See, e.g., Elam v. City of St. Ann*, 784 S.W.2d 330, 334 (Mo. App. E.D. 1990) (zoning ordinances are tested against the Due Process Clause using a reasonableness standard, and can be attacked both for facial invalidity and "as applied" to specific tracts of land). The case cited by JWJ also observes that an as-applied challenge could have been, but was not, brought. *Beatty v. State Tax Commission*, 912 S.W.2d 492, 495 (Mo. banc 1995). Were the Court to take this approach on the facts of this case, it would in essence of have set aside the issue of whether section 13 "does or does not allow the Auditor to draft a fiscal note," focusing instead on whether *this* fiscal note was the result of an "investigation" required by the constitution.

[14] The Court could also decline to reach the issue of Section 116.175's facial constitutionality, determining only that in this case, the Auditor did not apply it consistently with his grant of power under article IV, section 13.

In conclusion, the facts found by the trial court are relevant. Because this Court affirms judgment in a court-tried case on any ground which supports the result (here, vacatur of the fiscal note and summary, and striking them from the official ballot title), this Court can and should reach the facts in the event it does not reach or chooses not to reach the facial constitutional issues. Regardless of the route this Court chooses, the Auditor's fiscal note process and fiscal note summary did not come close to reaching the direct cost to public entities of worker wage increases. It marked a new low point in the still relatively short history of Auditor-drafted fiscal notes, should not have been placed before petition signers, and should not be placed before the voters.

III. JWJ'S REQUEST THAT THIS COURT "CLARIFY" THAT THE TRIAL COURT'S ORDER DOES NOT "INVALIDATE" PREVIOUSLY-SUBMITTED SIGNATURES IS UNRIPE AND WAS NOT RAISED IN THE COURT BELOW

Without designating any error by the trial court or pointing to the portion in the record where it confronted the trial court about the alleged lack of "clarity" in its final judgment, JWJ asks this Court to give an advisory opinion on what amounts to an anxiety JWJ has developed about the application of Sections 116.175 and 116.190. JWJ Br. 27. JWJ wants this Court to declare that if the fiscal note summary is vacated, the signatures on petitions including the fiscal note summary are still valid. This belatedly-sketched hint at an argument consumes

less than a page and is buried at the end of a section of the brief which addresses a different issue. This Court should disregard JWJ's invitation.

First, JWJ does not point to any place in the record where it raised its concern with the trial court, or pled or mounted any sort of as-applied challenge to the operation of Section 116.175, Section 116.190, or some other unarticulated statute, against its petition drive. Nor does JWJ explain how or why this Court's action in affirming the trial court's order would endanger the validity of its signatures, or which constitutional provision this would violate. Even JWJ's jurisdictional statement does not mention JWJ's constitutional anxiety about the application or validity of a Missouri statute as a basis for this Court's jurisdiction. JWJ Br. 1. JWJ has not argued its claim with specificity, and it is too late.

JWJ may argue that its concern stemmed from the trial court's judgment, and so could only have been raised now. A similar argument was rejected in *Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. banc 1996) ("An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal."). The Court noted that a constitutional challenge to joint and several tort liability should have been raised in the answer, citing other cases where judgment-related issues were untimely raised for the first time on appeal. Here, the problem is compounded because JWJ does not articulate the constitutional provision allegedly violated, its injury and standing to raise the

violation, or the statutes or other state action that cause the violation. Mr. Allred cannot meaningfully respond.[15]

Second, in the event JWJ intends to raise an issue with signature validity, a constitutional claim is not ripe until the Secretary of State certifies a signature count, the number of signatures appears to be otherwise sufficient, and a decisive number of signatures is declared invalid by the Secretary based on the unidentified state action or statute which JWJ fears will render signatures invalid.[16] The forum

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[15] JWJ cannot wait for its reply brief to properly raise, flesh out, and argue its nascent constitutional concern. Error first raised in an appellant's reply is not preserved, and this Court will not entertain such late-raised, new challenges to the judgment. *See Berry v. State*, 908 S.W.2d 682, 684 (Mo. banc 1995).

[16] If JWJ is raising this argument, its cited cases do not seem on point. For example, in *Ocello*, opponents of a bill passed by the General Assembly argued that it was invalidly passed because, after drafting the fiscal note, the Joint Committee on Legislative Research failed to hold a hearing requested by a legislator. *See Ocello v. Koster*, 354 S.W.3d 187 (Mo. banc 2011). The Court never reached the issue JWJ may wish to present here: whether an invalid fiscal note renders an enactment (or signatures) invalid. That is because, in contrast to the present case, no statute or constitutional provision required that a fiscal note be prepared, and no statute or constitutional provision required that the additional hearing be held as a precondition to the fiscal note's validity.

for challenging the Secretary's signature count is a challenge to be brought within 10 days of her signature certification under Section 116.200, RSMo. At that point, the Secretary's position and the number of signatures it affects will be clear. It will also be possible to determine other relevant facts, such as whether a voter's willingness to sign the petition was affected by statements in an invalid ballot title.

CONCLUSION

The trial court's decision must be affirmed. The Auditor's minimalist compilation of third party predictions and his refusal to "independently assess" future fiscal impact was either (1) not an investigation, or (2) did not relate to the supervising or auditing of the expenditure or receipt of public funds, or both. Further, as discussed above, this Court can reach these conclusions on the face of Section 116.175. Additionally, it can reach the same conclusions based on the facts or on the Auditor's admissions about his refusal to perform "analysis or evaluation of the correctness" of what he receives, his refusal to "independently assess" fiscal impact, and his belief in the "fiction that the fiscal note and summary would meet some standard of accuracy." Auditor Br. 12-13.

Either way, the trial court should be affirmed. If petition signers and voters are to rely on a fiscal note and summary from a constitutional officer bearing the dignity of the State Auditor, they deserve better.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief (a) contains the information required by Rule 55.03, (b) was prepared using Microsoft Word 2010 in Times New Roman size 13 font, and (c) complies with the word limitations of Rule 84.06(b) in that it contains 14,494 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2012, the foregoing Brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following counsel of record:

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